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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 256

RD-DR CORPORATION,

Petitioner,

against

CHRISTINE SMITH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SAMUEL I. ROSENMAN,
RICHARD S. SALANT,
AMBROSE DOSKOW,
Attorneys for Petitioner.

August 1950.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

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OCTOBER TERM, 1950.

No. .....

RD-DR CORPORATION,

Petitioner,

against

CHRISTINE SMITH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RD-DR Corporation, petitioner, prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered in this case on July 14, 1950.

Opinions Below.

The opinion of the District Court (R. 29-32) is reported in 89 F. Supp. 596. The opinion of the Court of Appeals (R. 37-44) is unreported.

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered on July 14, 1950 (R. 44). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the protection accorded by the United States Constitution to the press and speech is also applicable to motion pictures.

2. Whether the ordinance of the City of Atlanta, Georgia, which requires approval before a motion picture may be exhibited and authorizes the censors to withhold approval on the ground, among others, that exhibition of the picture will adversely affect the "peace, health, morals, and good order" of the City, is constitutional.

Ordinance Involved.

The pertinent provisions of the ordinance (R. 11-15) of the City of Atlanta, Georgia, are set forth in the Appendix. *infra,* pages 12-13.

Statement.

This is an action brought by petitioner and another to enjoin enforcement of an ordinance of the City of Atlanta, Georgia, purporting to subject motion pictures to censorship by requiring them to be approved and licensed by the defendants, the censor and the Board of Censors of the City. The facts alleged in the complaint (R. 2-9) and admitted by the answer (R. 22-26) may be summarized as follows:

During the year 1949, plaintiff RD-DR Corporation, a New York corporation (R. 2), produced a motion picture entitled "Lost Boundaries" (R. 5); plaintiff Film Classics Inc., also a New York Corporation (R. 2), engaged in distributing the picture by selling licenses to exhibit the motion picture in theatres (R. 5). "Lost Boundaries" is a serious drama about a negro family which lived for many years in a New Hampshire town where their neighbors believed them to be white (R. 6). The motion picture is not and is not claimed by defendants to be in any particular lewd, obscene, licentious or profane (R. 6).

Pursuant to the Atlanta ordinance, plaintiff Film Classics Inc. applied to the defendant censor for approval of the motion picture (R. 5-6). She disapproved it, and on appeal by Film Classics Inc., the defendant members of the Board of Censors upheld the censor's action and refused to issue a permit to exhibit the picture in Atlanta (R. 6). The refusal was solely on the ground that, in the opinion of defendant censors, the exhibition of the picture in Atlanta "will adversely affect the peace, morals and good order of said City" (R. 6, 16). In their answer, defendants allege that their decision was not arbitrary or capricious, but rather, in their considered and unbiased judgment, the exhibition of the picture would adversely affect the peace, morals and good order of the City because they believed it would create dissension and strife between the white and colored people and would be likely to cause disorders, disturbances and clashes between the races (R. 25-26).

If exhibition of "Lost Boundaries" had not been prohibited by the defendants, the plaintiffs could have licensed the exhibition of the picture to theaters within the police jurisdiction of the City of Atlanta (R. 5); the owners and operators of several such theaters are ready and willing to exhibit it and would do so but for the action of the defendants, the defiance of which would subject such owners and operators to criminal liability (R. 8, 25). The rentals which would have been derived by plaintiffs within the City, were it not for the action of defendants, exceed $3,000, exclusive of interest and costs (R. 7, 24).

The complaint alleged that the ordinance from which defendants derived their authority so to censor "Lost Boundaries" and prevent its exhibition in Atlanta is unconstitutional on its face in that it transgresses the due process clause of the Fourteenth Amendment (R. 4-5). Concurrently with their answer, defendants moved to dismiss the complaint (R. 26-7) and plaintiffs then moved for judgment on the pleadings (R. 28).

The District Court sustained the motion to dismiss the complaint on the ground that it states no cause of action (R. 32). While calling for a reexamination of the question

in the light of later decisions (R. 31), and while characterizing the action of defendants as attempting a "degree of thought control" (R. 32), the District Court nevertheless felt that it was bound by *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230, to hold that the constitutional guarantees afforded to the press and other media of communication do not extend to motion pictures.

In affirming the judgment of the District Court, the court below not only concluded that the *Mutual Film* case was decisive but declared that it was "in no doubt that the law was correctly laid down" in that case "and that the views there expressed ought not to be receded from" (R. 42). The court below condemned what it called the effort "to import the Bill of Rights into the Fourteenth Amendment" (R. 40). It described the plaintiffs' contentions as part of "the struggle to extend the Fourteenth Amendment as an instrument of nationalism by striking down all state regulatory power" (R. 39), and declared that apart from precedent, "a far more substantial reason than is here presented should be found for converting the Fourteenth Amendment into an instrument for the complete paralysis of the supervisory and regulatory powers of the states over the showing of motion pictures" (R. 43)[1].

Reasons for Granting The Writ.

The court below decided a Federal question of pervasive importance in the field of constitutional liberties in a way which is probably in conflict with applicable principles enunciated by this Court. Its decision is based on *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230—a case which has long since lost its vitality and should now be explicitly overruled.

---

[1] As authorized by Rule 48 of this Court, this petition is filed on behalf of only one of the plaintiffs, RD-DR Corp., the producer of "Lost Boundaries". After the case was submitted to the Court of Appeals, petitioner terminated its distribution agreement with the other plaintiff, Film Classics Inc., and reacquired from that plaintiff the full right to license the exhibition of the motion picture.

1. Under the decision of the courts below, motion pictures remain the one medium of mass communication which is outside the protection of the First Amendment. By this case, petitioner seeks to correct this anomaly. The issue posed is probably the most important and comprehensive question which remains in respect of the field to which the First Amendment applies. For the issue here is the basic one of whether that Amendment applies to motion pictures at all.

The question thus involves not only a significant constitutional issue, but an issue affecting millions of Americans who view motion pictures every week. The economics of the motion picture industry are such that a motion picture must reach a mass audience throughout the country if it is to yield a return on the investment in it. Inevitably, the mere existence of such legislation as the Atlanta ordinance is a deterrent to the production of pictures on any controversial, or indeed on any thoughtful, subject. For as this Court recognized in *Thornhill* v. *Alabama*, 310 U. S. 88, 97, the "character of the evil inherent in a licensing system" lies in "the power of the licensor" which is "pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

2. This case affords the Court with the opportunity to take the final and explicit step, clearly foreshadowed by its more recent decisions, which would bring motion pictures into their rightful place alongside other media of communication to which the protection of the First Amendment is extended. This Court has already clearly indicated that result, from which the court below turned.

In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, this Court stated:

> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment".

In *Kovacs* v. *Cooper,* 336 U. S. 77, the concurring opinions of Mr. Justices Frankfurter and Jackson and the dissenting opinion of Mr. Justice Black all specifically mentioned motion pictures as a medium of "mass communications". Mr. Justice Black, dissenting, wrote (336 U. S. at 102):

> "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems".

Since the first declaration, in *Gitlow* v. *New York,* 268 U. S. 652, 666, that the due process clause of the Fourteenth Amendment embraces freedom of speech and the press, this Court has not permitted a single exception to the means of communication that are within the constitutional protection. It has held that such protection extends to such varying means of expression as the display of a flag, *Stromberg* v. *California,* 283 U. S. 359; the flag salute, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; picketing, *Thornhill* v. *Alabama,* 310 U. S. 88; the distribution of leaflets in the streets, *Lovell* v. *City of Griffin,* 303 U. S. 444, *Schneider* v. *State,* 308 U. S. 147; house to house canvassing for the sale of publications, *Martin* v. *Struthers,* 319 U. S. 141; the distribution of crime magazines in which this Court could see "nothing of any value to society," *Winters* v. *New York,* 333 U. S. 507, 510; the playing of phonograph records, *Cantwell* v. *Connecticut,* 310 U. S. 296; and the use of sound amplifiers, *Saia* v. *New York,* 334 U. S. 558, *Kovacs* v. *Cooper,* 336 U. S. 77.

The role of the motion picture as an informational medium like the press has been recognized not only by this Court, but also by the legislative and executive branches of the federal government. The Act establishing the United States Information Service directs the Secretary of State, in carrying out its program, "to utilize, to the maximum extent practicable, the services and facilities of private agencies, including existing American press, publishing, radio, motion picture and other agencies" (22 U. S. C.

Section 1437). One of the resolutions adopted by the Inter-American Conference at Chapultepec linked "the press, motion picture and radio" in calling for early abandonment of wartime censorship. (Resolution XXVII in First Act of the Inter-American Conference on Problems of War and Peace—Mexico City, February-March 1945, Pan-American Union 1945, page 69). A provision of the Economic Cooperation Act (63 Stat. 51; 22 U. S. C. Section 1509(b)(3)) authorizing guarantees of private investments in "informational media" has been defined by the administrator to include motion pictures, as well as newspapers, magazines and books, among informational media. (ECA Reg. 4, as amended, 14 Fed. Reg. 3916.)

This general recognition of the vital role of motion pictures as a medium of communication is reflected in the *Paramount* case, *supra;* it is completely irreconcilable with the view expressed by the court below that motion pictures are "exhibitions and spectacles" which are not worthy of the protection of the First Amendment.

3. The decisions of this Court establish that the Fourteenth Amendment requires "the application to the States of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government" (*Bridges* v. *California*, 314 U. S. 252, 268). See *Near* v. *Minnesota*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Winters* v. *New York*, 333 U. S. 507. The court below plainly repudiated that principle.

That court found in the opinions in *Adamson* v. *California*, 332 U. S. 46 and *Wolf* v. *Colorado*, 338 U. S. 25, and in the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, ground for the conclusion that this Court will now affirm the holding in the *Mutual Film Corporation* case. It is respectfully submitted that the court below misapplied those opinions of this Court. The *Adamson* and *Wolf* cases deal with the perplexing question whether certain provisions of the Bill of Rights

other than those embodied in the First Amendment are made applicable to the States; in no way do they limit the rule of the *Near* case and the many which have followed it, by which the states are forbidden to trespass upon rights protected by the First Amendment. That the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper, supra,* affords no support to the decision below is shown by the fact that that opinion impliedly condemned the type of censorship here involved. Mr. Justice Frankfurter wrote (336 U. S. at 97):

> "*So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace,* it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection." (Emphasis added).

The Atlanta ordinance undertakes to do exactly what Mr. Justice Frankfurter here implied that a legislature may not do,—to prescribe what ideas may be expressed upon the screen and what may not be.

4. Whether attention is focused on the First Amendment or the Fourteenth Amendment, many decisions of this Court establish that, once motion pictures are recognized as a medium of communication entitled to the constitutional freedoms, the Atlanta ordinance must be held to be invalid on its face.

It is invalid as improperly imposing a prior restraint. *Near* v. *Minnesota,* 283 U. S. 697; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Hague* v. *CIO,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Thomas* v. *Collins,* 323 U. S. 516. The Atlanta ordinance is also invalid because the standards which it embodies are so broad that, whatever the sanction, whether a prior restraint or subsequent punishment, it embraces constitutionally protected expression. *De Jonge* v. *Oregon,* 299 U. S. 353; *Thornhill* v. *Alabama,* 310 U. S. 88; *Bridges* v. *California,* 314 U. S. 252;

Winters v. *New York,* 333 U. S. 507; *Terminiello* v. *Chicago,* 337 U. S. 1.

Indeed, the ground on which the Atlanta censor may ban, and here has banned, a motion picture—that of adverse effect upon "peace" and "good order"—is indistinguishable from that which this Court has held insufficient as a justification for the licensing of street meetings (*Hague* v. *CIO,* 307 U. S. 496). The Atlanta ordinance shows on its face that what the city is attempting to do is "to protect the public against false doctrine" and thus to defy "the very purpose of the First Amendment", which "is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion" (*Thomas* v. *Collins,* 323 U. S. 516, concurring opinion of Mr. Justice Jackson at 545).

In sum, it is plain that what the Atlanta ordinance permits defendants to do in respect of motion pictures, and what defendants have done pursuant to such authorization, is precisely what has been condemned by this Court in respect of other media of expression.

5. The constitutional issue is presented by this case in a posture peculiarly free of encumbering procedural or jurisdictional issues. Jurisdiction is based both on the federal question and on diversity of citizenship. It is clear both that petitioner has standing to raise the question[2] and that no reason exists for the Federal judiciary's withholding its hand in the matter.

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[2] The termination of the contract between the two plaintiffs (see page 4, footnote, *supra*) in no way affects the present controversy. Obviously the admitted facts remain that exhibitors in Atlanta are ready and willing to exhibit the motion picture and that the refusal of the defendants to license it has resulted in the loss of film rentals exceeding $3,000. This petitioner now has all the rights in the motion picture which, at the time of the filing of the complaint and the submission of the case to the courts below, were held jointly by petitioner and Film Classics Inc. The grievance asserted in the complaint is now the grievance of this petitioner alone. The injury complained of is now being suffered by this petitioner alone.

Although the Atlanta ordinance imposes penalties only upon those who exhibit unapproved motion pictures, the economic pinch is felt by the owners of the pictures which cannot be shown in the City, not by the exhibitors whose theaters will be operated with one picture or another. Under these circumstances, plaintiff's standing to invoke federal equitable jurisdiction is fully sustained by the decisions of this Court in *Truax* v. *Raich,* 239 U. S. 33; *Terrace* v. *Thompson,* 263 U. S. 197; *Pierce* v. *Society of Sisters,* 268 U. S. 510; and *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407.

The propriety of the exercise of federal equity jurisdiction to determine the important constitutional question presented is upheld by many decisions of this Court. See, *e.g., Packard* v. *Banton,* 264 U. S. 140, 1943; *Tyson* v. *Banton,* 273 U. S. 418, 428; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Parker* v. *Brown,* 317 U. S. 341, 349-50; *Toomer* v. *Witsell,* 334 U. S. 385, 391-2.

Here, as in *Toomer* v. *Witsell, supra,* "there is neither need for interpretation * * * nor any other special circumstances requiring the federal court to stay action pending proceedings in the State courts." The ordinance was enacted pursuant to specific statutory authority, and the action of the respondents follows the exact wording of the ordinance. Thus, in sharp contrast to *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, there is not in this case a question involving local law or interpretation the resolution of which might dissipate or circumscribe the constitutional issue—even if it were assumed, contrary to the fact, that petitioner had a means of ingress to the state courts.

Indeed, there is no plain remedy which petitioner might have invoked in a state court. Obviously, neither of the plaintiffs could have tested the validity of the ordinance by taking action which would have precipitated criminal prosecution against them. For the prohibitions of the ordinance apply only to exhibition, and not to production or distribution. Nor did petitioner or the other plaintiff below have a clear remedy in the form of injunctive relief

in the Georgia courts. *Cf. City of Atlanta* v. *Universal Film Exchanges,* 201 Ga. 463, 39 S. E. (2d) 882. In that case, the author of the opinion frankly admitted that after examining the Georgia decisions on the exercise of equity jurisdiction over administration of the criminal law, he was "unable to reconcile some of the decisions with others". The confusion in the Georgia law on this subject was conceded by the defendants' attorney upon the argument in the District Court. While he suggested the possibility that there might be review by certiorari, that remedy is limited to review over the exercise of judicial power (Georgia Code, Sec. 19-101), and the Supreme Court of Georgia has held that it is available only where the law grants a right "to demand a trial in accordance with judicial procedure". *South View Cemetery Association* v. *Hailey,* 199 Ga. 478, 481, 34 S. E. (2d) 863, 866. It is plain that the Atlanta ordinance vests no such judicial power in the Board of Censors.

It is apparent that only by invoking the equity jurisdiction of the District Court could the plaintiffs secure a plain, adequate and complete remedy against enforcement of the ordinance. The courts below properly assumed that the District Court had jurisdiction and should exercise it to determine on the merits the constitutional issue that is presented. The opportunity to determine the question which the District Court said "appears to need re-examination" (R. 31) is squarely presented to this Court.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

SAMUEL I. ROSENMAN,
RICHARD S. SALANT,
AMBROSE DOSKOW,
Attorneys for Petitioner.

August 1950.

APPENDIX.

Excerpts from

ORDINANCE GOVERNING THE EXHIBIT OF MOTION PICTURES IN ATLANTA.

* * * * * *

Section 2. It shall be unlawful for any person to exhibit or cause to be exhibited within the City of Atlanta or within any other territory over which the City exercises Police jurisdiction, any picture or moving picture unless the same has been approved by the Censor or the Board of Censors as herein provided. It is declared to be the purpose of this ordinance to prevent the display of obscene or licentious pictures or other pictures that may adversely affect the peace, health, morals, and good order of said City.

Section 3. There is hereby created in the Department of Carnegie Library the position of Motion Picture Censor. * * *

* * * * * *

Section 4. The Carnegie Library Board is hereby declared to be the Board of Censors and the members thereof are hereby invested with all the power and authority in connection with the regulation of moving picture shows set forth in the Charter of the City, same being Section 5-305, Code, City of Atlanta, 1942. They are specifically given the power to censor, supervise and regulate all public exhibitions, plays, motion pictures, performances, pantomines, or other exhibitions within the City of Atlanta where charges are made for admissions to such. Said Board shall also have the power to prohibit any public exhibition, play, motion picture, performance, pantomine, or other representation which shall be immoral, lewd, obscene, licentious in character, or profane, and shall have the power to review

any decision of the censor in connection with motion pictures.

* * * * * *

Section 6. It shall be the duty of the Censor to examine and view such films or pictures as any person may offer for display in the City of Atlanta, and if the same are obscene, lewd, licentious, profane, or will in his opinion adversely affect the peace, health, morals and good order of the City, he thereupon shall order a deletion of such scene or scenes or dialogue, and upon compliance with said order the film or picture may be presented. The Censor shall transmit to the Board of Censors a monthly detailed report of his actions.

Section 7. Any person aggrieved by any action of the Censor may within ten days thereof take an appeal to the Board of Censors, which Board shall promptly review the decision of the Censor, and shall confirm, modify or reverse such action. Any decision reached by said Board on appeal shall be final except that it may be subject to review by the Courts under the applicable statutory law.

* * * * * *

Section 11. Any person convicted in the Recorders Court for the violation of any of the provisions, shall be fined not to exceed $500.00 or to work on the public works not to exceed 30 days, either or both, in the discretion of the Recorder. Each day shall constitute a separate offense.

* * * * * *

No. 256

RILEY CORPORATION

Petitioner

v.

CHRISTINE SMITH, ET AL,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1950

RD - DR CORPORATION
Petitioner

V.

CHRISTINE SMITH, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The summary of facts contained in the Statement made in the petition for certiorari (P 2) is reasonably accurate as far as it goes. It shows only that claim was made that the ordinance, partly set forth in the appendix to the petition and set forth fully in the record (R p. 11) was unconstitutional. The petition also attacked as unconstitutional Section 5-305 of the Code of the City of Atlanta (set out on p. 9 of the record), the same being the statutory charter authority pursuant to which the ordinance, which was also attacked as unconstitutional, was adopted (R pp. 3, 4, 5, and 7).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

1.

The first and fundamental question presented by petitioner, as set out on page 2, is "Whether the protection accorded by the United States Constitution to the press and speech is also applicable to motion pictures."

This question has already been unequivocably decided in the negative by this court in the case of Mutual Film Corporation v. Industrial Commission of Ohio, *236 U. S. 230*, and the decision of the Circuit Court of Appeals for the Fifth Circuit, which it is now sought to review, decides the question exactly in accordance with the decision of this court in the Mutual Film case.

2.

The petition does not bring itself within a single one of the reasons set forth in sub-paragraphs (a), (b) and (c) of Rule 38 of this court as the reasons for granting ~~this~~ the writ of certiorari.

3.

It is not shown that the decision of the Circuit Court of Appeals for the Fifth Circuit is in any wise contrary to any decision of any court in the United States. As a matter of fact, so far as we have been able to determine, the decision which it is sought to have reviewed is not only in accordance with the decision of this court in the Mutual Film case, herein referred to, but is in accord with every decision rendered on this subject by all State and Federal courts of the country. The said Mutual Film Corporation case was cited with approval as late as 1949 in a decision of this court. See con-

curring opinion of Mr. Justice Frankfurter in the case of Kovacs v. Cooper, *336 U. S.* beginning on p. 96.

It is shown by the record that the ordinance which it is claimed is unconstitutional (R p. 11) was adopted by the City Council of Atlanta pursuant to Section 5-305 of its charter (said section in record, p. 9), which charter authority it is also claimed in this suit to be unconstitutional (R pp. 3, 4, 5, and 7). Therefore, this charter authority and the ordinance adopted pursuant thereto constitute State action, and should not be interfered with by Federal courts until these state laws have been construed by the State courts. Shippan v. DuPree, *No. 689*, decided by this court March 31, 1950. Petitioner seeks to avoid this matter by claiming that there is no clear remedy in the form of injunctive relief in the Georgia Courts, (p. 10 of petition), citing City of Atlanta v. Universal Film Exchanges, Inc., *201 Georgia 463*, which was a case in which the same charter provision and the same ordinance were attacked as unconstitutional on the same grounds as in this case, and injunction prayed. Injunction was granted by the trial court but the case was reversed by the Supreme Court of Georgia because the petition did not set forth a cause of action. However, a reading of this case, particularly what is said on p. 472, will disclose that the Georgia Supreme Court in effect stated that if petitioners in that case had alleged, as did the complainants in this case, that they had contracted, or attempted to contract, with any other person for the exhibition of the picture in Atlanta, or that any other person desired to so exhibit it, that the petition would have stated a cause of action authorizing an adjudication by the State courts of the questions raised. We therefore say that the claim-

ants in this case had an available and adequate remedy in the State courts and should have pursued the same there before appealing to the Federal courts.

5.

This case was originally filed by two complainants, Film Classics, Inc. and RD-DR Corporation (Complaint, R p. 2). Film Classics, Inc. had the exclusive right to distribute and license the exhibition of the picture involved (R p. 5) and it, and it alone, applied for and was refused a permit to show the picture in the City of Atlanta. It was the only complainant which had been denied any alleged right by the defendants (R pp. 5 and 6). Film Classics, Inc. was the only one (if any one was) entitled to bring this action. No specific question was raised in the court below against RD-DR Corporation being a party because if Film Classics, Inc. was entitled to maintain the suit, the addition of the other plaintiff was mere surplusage and made no difference. Now, however, Film Classics, Inc. is out of the picture (see note at bottom p. 4 of petition for certiorari) and the petition for certiorari is made only by RD-DR Corporation. It is therefore respectfully urged that notwithstanding Rule 48 of this court RD-DR Corporation never having applied for nor been denied the right to show the picture involved so as to entitle it to attack the constitutionality of the laws in question, has no right to maintain alone a petition for certiorari in the case.

6.

There is no evidence in this case. It was disposed of only on the complaint and defendants' motion to dismiss (petition for certiorari, p. 3). While many facts are assumed and stated in the petition for cer-

tiorari which are not set out in the complaint, found in record, p. 2, this case should be considered only on the facts judicially before the court in the complaint, and it is respectfully submitted that the facts set forth in the complaint are not sufficient to authorize a finding that motion pictures come within the freedom of the press clause of the Constitution, even if the court were inclined to so hold, if sufficient evidence as to motion pictures had been presented.

7.

Motion picture companies are primarily and fundamentally engaged in the business of entertainment for profit, and the holdings heretofore made by all courts of the country, including the Supreme Court of the United States, that motion pictures do not constitute a part of the press of the country, should not be disturbed. The particular picture involved in this case "was produced and is being distributed primarily for entertainment to theatre audiences." (Complaint, R p. 7). That the motion picture industry is engaged primarily and principally in entertainment, and is legally so classified, is shown the fact that the United States Government by Act of Congress assesses an *entertainment tax* on admission tickets to such performances.

In view of the foregoing, respondents respectfully pray that the petition for certiorari in this case be denied.

Respectfully submitted,

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J. C. MURPHY
J. M. B. BLOODWORTH
JOHN E. FEAGIN
HENRY L. BOWDEN

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SEP 27 1950
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 256.

RD-DR CORPORATION,

Petitioner,

against

CHRISTINE SMITH, *et al.*,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SAMUEL I. ROSENMAN,
RICHARD S. SALANT,
AMBROSE DOSKOW,
Attorneys for Petitioner.

September 1950.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

Supreme Court of the United States

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Respondent's brief (p. 4) contends that petitioner may not maintain this attack on the constitutionality of the Atlanta censorship ordinance because the application for approval of its motion picture was made by the co-plaintiff, Film Classics, Inc., which did not join in the petition since its distribution rights have been terminated. This memorandum is addressed solely to that point.

1. In setting forth the facts regarding the changed interest of Film Classics, Inc., petitioner's counsel followed the procedure recommended in the recent text by Stern and Gressman for cases of possible mootness or abatement (*Supreme Court Practice,* pp. 339-40). Since respondents have raised a question as to the interest of the petitioner to proceed alone, we are annexing to this memorandum copies of the documents which establish that petitioner has succeeded to the rights of both the original plaintiffs.

Annexed hereto as Exhibit 1 is an extract from the distribution agreement between the two original plaintiffs regarding the right of petitioner to terminate that agreement. Annexed hereto as Exhibit 2 is an excerpt from the New York Law Journal of June 30, 1950, showing that Film Classics, Inc. had assigned for the benefit of creditors. On June 30, 1950, petitioner addressed a termination notice by registered mail to Film Classics, Inc., and a copy of that notice is annexed hereto as Exhibit 3. The right to distribute the picture in the City of Atlanta, which petitioner reacquired from Film Classics, Inc. upon the mailing of that notice, has not been granted by petitioner to any other party. Upon the termination of the distribution agreement petitioner succeeded to the entire interest of Film Classics, Inc. in the motion picture and to all the rights which that company secured by its application to the respondents for approval of the picture, and those rights are now in petitioner alone.

2. Furthermore, this action challenges the validity of the Atlanta ordinance on its face. Apart from the necessity of establishing that the required jurisdictional amount is involved, neither plaintiff was obligated to apply for approval of the picture before commencing the action. Compare *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Hague* v. *C. I. O.,* 307 U. S. 496; *Thornhill* v. *Alabama,* 310 U. S. 88, 97. Respondents' answer admits that their action pursuant to the Atlanta ordinance deprived the plaintiffs of film rentals which would have exceeded the sum of $3,000 (R. 24). The present petitioner is now the only party that is suffering that loss. That loss is the direct result of the decision which respondents reached regarding petitioner's motion picture, and that decision was obviously unaffected by the identity of the applicant for approval of the picture.

3. The suggestion in the opposing brief that petitioner was not originally a proper party to the suit is wholly groundless. When the complaint was filed petitioner was suffering a part of the loss resulting from the application of the ordinance. Now petitioner is bearing the entire loss alone. The joinder of the two plaintiffs was plainly authorized by Rule 20 of the Rules of Civil Procedure. It is equally plain that the filing of the petition by the present petitioner alone is authorized by Rule 48 of the Rules of this Court.

In any event, the question of petitioner's standing as an original party is not now relevant, since respondents concede that Film Classics, Inc. was a proper party and since, as shown above, petitioner has succeeded to the rights of Film Classics, Inc.

Respectfully submitted,

Samuel I. Rosenman,
Richard S. Salant,
Ambrose Doskow,
Attorneys for Petitioner.

Exhibit 1.

Extract from Distribution Agreement dated February 23, 1949 between RD-DR Corporation as Producer and Film Classics, Inc. as Distributor, Relating to the Motion Picture Entitled "Lost Boundaries".

FORTIETH: If Distributor shall fail to make any payment hereunder when due, or if Distributor shall default in the performance or observance of any material term covenant or condition of this agreement on its part to be performed, and such default shall continue for a period of ten (10) days after written notice thereof sent by Producer, or if Distributor should file petition under one or more of the provisions of the Bankruptcy Act of the United States, or if a petition under one or more of the provisions of the Bankruptcy Act of the United States should be filed against Distributor or a receiver, trustee, custodian or liquidator should be appointed over substantially all of the assets of Distributor by any court having jurisdiction, and such petition against Distributor, or such appointment shall not be dismissed or vacated within thirty (30) days thereafter, *or if the Distributor should make a general assignment of all its assets* or if the Distributor shall be dissolved, either voluntarily or involuntarily, then and in any of said events *Producer,* in addition to all other rights and remedies which it may have and without derogation thereof, *shall be entitled to terminate this agreement by mailing notice of such termination to Distributor by registered mail, and upon the mailing of such notice this agreement and the license herein granted shall forthwith terminate, cease and come to an end.* The Producer shall, upon such termination of this agreement, be entitled to be subrogated to the rights of Distributor with respect to the Picture under such exhibition contracts or other agreements relating to the distribution, marketing or exploitation of the Picture as Producer may elect, without the assumption of any liability thereunder by Producer. Upon such termination, the Producer shall have the right to take possession of, and Distributor

shall forthwith deliver to Producer, all prints and negatives of the Picture, all advertising material contracts with exhibitors and abstracts from books of account and records of bookings with reference to the Picture, and all records of Accounts Receivable in connection with the distribution of the Picture, without liability therefor to any person, firm or corporation, or other entity whatsoever, and Producer shall have the right to purchase advertising material for the Picture directly from those supplying same to Distributor. In such event Producer may arrange for the distribution of the Picture by any third party upon such terms as it may deem advisable, but shall pay Distributor sufficient sums to reimburse it for the advances made under this agreement, after Producer has reimbursed itself in full for its additional expenses incurred in taking over the distribution of the Picture, and subject to any claims by Producer against Distributor by way of damages.

(Emphasis supplied.)

Exhibit 2.

Extract from New York Law Journal,
Friday, June 30, 1950.

ASSIGNMENTS

NEW YORK COUNTY

Film Classics, Inc., motion picture distribution at No. 1501 Broadway, yesterday assigned for the benefit of creditors to Irving Kaufman of No. 1440 Broadway.

Exhibit 3.

June 30, 1950

Film Classics, Inc.
1501 Broadway
New York 18, N. Y.

Gentlemen:

Reference is made to the Distribution Agreement dated February 23, 1949 between your company as Distributor and the undersigned as Producer relating to the motion picture entitled LOST BOUNDARIES.

In view of the fact that you made a general assignment of your assets for the benefits of creditors on June 29, 1950, we hereby give you notice that we elect to terminate said Distribution Agreement pursuant to the provisions of Article FORTIETH thereof.

We hereby demand that pursuant to the provisions of said Article FORTIETH, you prepare to deliver to us forthwith all prints and negatives of said motion picture, all advertising material relating thereto, all contracts with exhibitors, abstracts of books of account, records of booking with reference to the picture, and all records of accounts receivable in connection with the distribution of the picture. Specific instructions regarding such delivery will be given to you next week.

Very truly yours,

RD-DR CORPORATION

By /s/ F. BORDEN MACE
President